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Supreme Court, U.S.
FILED
APR 20 2004
OFFICE OF THE CLERK

No.03-1249

IN THE
SUPREME COURT OF THE UNITED STATES

PHYLLIS FILOSO,

Petitioner
Pro Se

v.

PRINCE WILLIAM COUNTY SCHOOL BOARD,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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PWCS does not state the facts on which Ms. Filoso filed a complaint accurately to this court or the correct cause of action.

Ms. Filoso filed a timely amended complaint accurately to the U.S. District Court for the Eastern District of Virginia. The complaint was a civil action alleging discrimination and unlawful discharge in violation of the Rehabilitation Act of 1973, and the Americans with Disabilities Act, 42 U.S.C.A ξξ 12101 et seq. The Complaint stated that she had been diagnosised with a neurotoxic illness, Reactive Airways Disease (RADS) and toxic encephalopathy. The complaint stated that Filoso has a breathing impairment, respiratory ailments, due to exposures to everyday products, substances and chemicals. At no time did Filoso state her impairment was multiple chemical sensitivities((MCS) or Idiopathic Environmental Intolerance Syndrome (IEIS) as PWCS states. Amended Complaint

A. PWCS asks the courts to rule that an individual does not have a disability based on the name of the illness.

Congress never envisioned such and clearly articulated in the Rehabilitation Act, Americans with Disabilities Act (ADA), Fair Housing Act, 1991 Civil Rights Act, and Amended Rehabilitation Act just the opposite.

Ms. Filoso states that she has an impairment based on breathing difficulties that are triggered by common everyday chemicals one can encounter in daily life. She has escalating symptoms which include rashes, headaches, upset stomach, high blood pressure, difficulty concentrating, headaches, and flu like achiness, weakness, chest pain, and fatigue when exposed to these chemicals. Amended Complaint

PWCS has consistently tried to muddy the waters by incorrectly attempting to analyze this case as if it were a causation case based on liability and argue this case as such

concerning her disability. The correct application of the law is causation as it relates to her claims of intentional discrimination and retaliation because of her disability. Causation under the ADA is whether the disability was a motivating factor in the adverse actions taken by the employer.

The language in the ADA and Rehabilitation Act are clear in that they define a disability as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual. 42 U.S.C.A. ξ 12102(2)(A). The regulations define "physical or mental impairment" as "[a]ny physiological disorder, or condition" affecting one or more specified body systems. 29 C.F.R. ξ1630.2(h)(l)(1997). Congress in enacting the Fair Housing Act , 42 U.S.C. 3602(h), and the Department's implementing regulation, 24 C.F.R 100.201(1991) was aware of the judicial interpretation of the term "handicap," as used in the Rehabilitation Act to include MCS or Environmental Illness (EI). [1] In the

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[1] Vickers v Veterans Administration, 549, F. Supp. 85, 86-87 (W.D.Wash. Rosiak v Department of the Army, 679 F. Supp. 444 (M.D. Pa. 1987) aff'd, 845 F.2d 1014 (3rd Cir. 1988), . Kouril v Bowen, 912 F.2d 971, 974 (8th Cir. 1990) Kornock v Harris, 648 F.2d 525, 527 (9th Cir. 1980), Kornock v Harris 648 F.ed 525 (D.Mass 1997) (on appeal, commissioner stipulated that the Social Security Administration "recognize(d) multiple chemical sensitivity as a medically determinable impairment") Robinson v SAIF Corp., 78 Or. App.581, 717 P.2d 1202 (1986), Pennsylvania Human Relations Commission, 598 A.2d 594 (Pa. Commw. 1991) ("Lincoln") California Court of Appeals held in County of Fesno v. Fir Employment and Housing Commission of the State of California, 226 Cal. App. 3d 1541, 1550, 277 Cal. Rptr. 557, 563 (Cal. App. 5th Dist. 1991) . Kallas Enterprises v. Ohio Civil Rights Committee, 1990 Ohio App. LEXIS 1683 (Ohio Ct. App. May 2, 1990, the Court of Appeals citing Vickers, cont. discussed, supra, at 10-11, ruled that "occupational asthma" and a hypersensitivity to rustprooffing chemicals," are handicaps within the meaning of the Ohio Civil Rights Act ("Ohio Act"), Ohio Rev. Code 4112 et seq. Kent State University v. Ohio Civil cont.

preamble to the regulations implementing the Fair Housing Act, HUD noted "the clear legislative history indicating that Congress intended that the definition of 'handicap' be fully as broad as that provided by the Rehabilitation Act." 24 C.F.R. Subtitle B, Ch. 1, Subch. A, App. 1 at 704 (1991). To support this conclusion, the preamble cited portions of the House Report and floor debate on the Act which reflected Congress's desire that the two definitions be interpreted consistently. Before Congress passed the Fair Housing Amendments Act lower federal courts had interpreted the Rehabilitation Act to cover MCS and EI as handicaps. It is a generally accepted principle of statutory construction that where the judiciary has given "contemporaneous and practical interpretation" to "an expression" contained in a statue, and the legislature adopts the expression in subsequent legislation, the judicial interpretation is "prima facie evidence of legislative intent. Sutherland Stat. Const. 49.09 (4th ed. 1984) at 400The U.S. Supreme Court has applied this principle to interpreting civil rights statutes. Cannon v. University of Chicago, 441 U.S. 677 (1979) ("Cannon") and Lorillard, A Division of Loew's Theatres, Inc. v. Pons, 434 U. S. 575 (1978) (Lorillard").

Congress in 1990 made no changes to the ADA based on court interpretations and in 1992 in it's Amendments to the Rehabilitation Act to bring it in line with the ADA changed the word handicapped to disability and under ξ 504 amended to clarify that it is to be construed consistently with the ADA 29 U.S.C.ξ 794(d). This included changing the wording of "solely" on the basis of disability to "because of" disability Additionally when considering the Fair Housing Act, Congress considered proposals to limit the category of "handicaps" to more traditionally recognized ones.Congress rejected those proposals. By adopting the definition it did,

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Rights Commission, 64 Ohio App. 3d 427, 581 N.E. 2d 11356 (1998). 581 N.E.2d at 1137.

Congress rejected the more restrictive proposals. Interpreting the Rehabilitation, Fair Housing Act and ADA to include persons with MCS and IE is consistent with that Congressional intent.

The dictionary defines impairment as "to make worse; diminish in value;less;damage. Condition is defined as state of health;state of being. It is undisputed that Filoso has medical documentation of severe respiratory problems in response to her repetitive exposures to a wide variety of chemicals. She therefore fits the perquisite requirement of the ADA and Rehabilitation ACT for a disability based on such guidelines Filoso would also point out to this court that when new diagnosis/treatment are introduced to the medical community there is generally a dispute. The entire medical field of Allergy/Asthma and allergy shots was considered controversial, not an accepted medical field and unaccepted medical practice until finally gaining recognition by the medical community in the 1960's. Medical science historically meets up with the courts after the Fact. Causation of the impairment itself is not part of the ADA or Rehabilitation Act.

Specific agencies of the Government that oversee the Rehabilitation Act are charged with supervisory duties to insure that public entities receiving funding comply with the Acts. Fitzgerald who is the 504 Compliance Officer never contacted any reputable authority for guidance with Filoso. Appellant Brief hereafter Appel..Br.Tab28p.129. The Department of Justice states that analysis must be made on a case by case basis and these conditions can be considered handicaps. From the Department of Justice, effective date January 26, 1992, Nondiscrimination on the Basis of Disability in State and Local Government Services, Agency: Department of Justice, Action: Final Rule, 28 CFR Part 35 under Test A 35.104. Unified School District, 1 National Disability Law Reporter ("NDLR") para. 61, p. 311 (May 24, 1990). **Additionally, the Department of Education (DOE) through its office of Special Education which**

PWCS falls under the supervision of issued a letter on Jan 8, 2001 giving additional guidance on MCS to all schools on possible accommodations. Federal Register Vol.66, No.113 Tues./Notice.. The Department of Labor (DOL) has a similar policy. When Gill was given a packet Filoso had received from the Job Accommodation Network (JAN) through the DOL concerning MCS and EI and possible job accommodation and employer responsibilities he didn't do anything other than state, "I just thought it was just something she got off the Internet." Appellant Brief Appendix (tab)25 p.283, hereafter Appel.Br. tab 25 p.283.

The third circuit has implemented this policy by stating that "request for accommodation does need to identify the specific diagnosis or name of the condition that limits or disables the employee. As long as the employer, however has sufficient information to know whether and how the employee can be accommodated." Taylor v Phoenxville School District 184 F.3d 296 (3rd Cir. 1999). . Filoso and her doctor proactively clearly stated to PWCS what was in her environment that is causing her breathing difficulties and other symptoms. Appel.Br.Appendix (App) C 8,10., Pet.Br.App.D.8. PWCS misleads the court through incorrect statements. PWCS does not claim that they undertook any investigation or action based information given them.

B. PWCS does not address the issues before this court, those being that the Fourth Circuit failed to consider the duty of an employer to engage in the interactive process to find an effective accommodation and the duty to transfer Filoso when there was an effective vacancy for which she was qualified.

1. Filoso has shown that a vacancy to which she was qualified existed at Brentsville and PWCS does not deny it existed. Pet.Br.App C17,

2. Filoso has shown that the vacancy was a reasonable accommodation. Pet. Br.App C17

3. Filoso has shown that PWCS did not discuss any options or vacancies with her not does PWCS deny this. Pet.Br.App.

C17. "Failure to discuss options/vacancies is evidence of "Lack of Good Faith" and "Intent to discriminate". Fjellestad v Pizza Hut 188 F. 944 (8thCir. 1999).

4. Filoso has shown that had PWCS engaged in the interactive process there would have been no cause of action against Filoso..

Affirming Summary Judgment was therefore inappropriate as Filoso has made a prima facie case for discrimination when these factors are considered as sister circuits have. These were also triable issues of fact and not appropriate for summary judgment. Certiorari is appropriate for this court to settle the dispute between the circuits on these issues.

C. Filoso is a qualified individual capable of performing the essential functions of her job with reasonable accommodations.

Language in regulation 29 C.F.R.ξ 1630.9 (d)gives direction to whether an individual is considered qualified when essential job functions are not met in relation to accommodation. "A qualified individual with a disability is not required to accept an accommodation, aid, service, opportunity or benefit which such qualified individual chooses not to accept. However, if such individual rejects a reasonable accommodation, aid, service opportunity to benefit that is necessary to enable the individual to perform the essential functions of the position held or desired, and cannot as a result of that rejection, perform the essential functions of the position, the individual will not be considered a qualified individual with a disability."

Filoso despite notifying Fitzgerald and Gill in Aug. 2001 prior to school opening that her assignment was not effective went to work and tried every means at her disposal to make her assignment work. Pet. Br. App.C 18. In light of 29C.F.R.ξ1630.9 Filoso would make the argument that she made a "good faith attempt" to work in their "so called accommodations" that she has complied with the regulation and when she cannot perform the essential functions of remaining at work all day is still considered a qualified

individual with a disability. An illegal employment practice resulted in Filoso's missed time from work after she had reported to work .**PWCS kept a daily log on Filoso that proves she showed up an attempted to work in that environment.** Not just 7 days as PWCS claims. Appel. Br. Appendix(Tab) 61, Fil 658., Resp.Br.10. PWCS made no attempt to determine why their "accommodation" was not working or to explore other options with Filoso which were limiting her ability to perform the essential functions. PWCS never claimed Filoso had any attendance issue when she was not reporting illness due to exposures in her work environment.

PWCS cited unprofessional conduct of excessive absences not that she was incapable of working had she had proper accommodations. Nor do they claim that they ever effectively accommodated her.Resp.Br. 1.

PWCS in citing Carter v Ball 33 F.3d 450, 460(4th Cir.1994) and Williams v Cerebonics, Inc., 871 as having legitimate reasons for adverse actions then fails. We are left with retaliation due to her disability and her requests for proper accommodations under the Acts.

D. PWCS failed to address the issue before this court of constructive discharge/retaliation as it applies to an employer's action that results in an intolerable work environment for the individual with a disability and not a regular person.

5. Filoso has shown that PWCS did not provide her the accommodation at Forest Park she was told she would receive. Appel.Br.tab 12. Placing Filoso back in the same room was an "act of harm". The only possible outcome would be constructive discharge when they demanded she work in such an environment in violation of her contract, school board policy 561.02-1or be terminated. Appel.Br.tab 86

6. Filoso's essential job functions does not require teachers to work in an environment that is hazardous to themselves or their students. Id. 25. Board Policy 404.04-(C) also. Id.

7. Filoso has shown that Forest Park continued to have toxic sewer gas in the building again in the fall of 2001 and that PWCS had continued the floor waxing while she was in the building. Both of which had significant health consequences to Filoso. Appel.Br. tab 34, Resp.Br.9.

E.. PWCS actions clearly indicate intent to retaliate against Filoso based on her disability and accommodation requests.

The following actions are not speculative but state facts that show deliberate actions taken by PWCS denied Filoso the benefits and privileges of employment.

8. Filoso has shown that Fitzgerald who is the 504 Compliance Officer as well as Personnel Director did not give guidance nor contact any government agency for guidance. He surfed the Internet for his information. Appel.Br. tab 28p.129.

9. Filoso has shown that her "invisible" disability and accommodation requests were the subject of humor, and derision remarks.Appel. Br. App.C36-38. Fitzgerald testimony at fact finding hearing . Fil 418.

10. Two facts merge. One Gill states he was told by Personnel Office that Filoso had no disability. Plaintiff SJ.Ex. 2.p.40. Two Gill states he made no accommodations for Filoso for the 2001-2002 school year. Appel. Br. tab 15 p.268. Filoso is told they are accommodating her disability to her and PWEA yet behind her back are making these statements and not made privy to until Oct. 31st. Appel.Br.Tab 86.

11. PWCS never claimed that they made an effective alternate accommodation for Filoso. They state they provided her with a "comfortable" work environment.Appel.. Br.Tab86

12. PWCS claims they made reasonable accommodations to the satisfaction of Filoso's doctor. PWCS omits Sept. 13 letter which clearly states just the opposite. Appel.Br. Tab,86,72

13. PWCS never responded to Filoso's inquiry about the school's cleaning.Pet..Br.7

14. PWCS never responded to Filoso's request for Material Safety Date Sheets (MSDS) for products used in renovations at Brentsville. Filoso deposition

15. PWCS did not respond to Filoso's request for a room with a window in the fall of 2001 for six weeks and then was told NO without any discussion of options/alternatives. Appel.Br.tab86

16. Filoso also has shown that her initial transfer from Brentsville was involuntary not offered as they stated. Resp.Br.p.6., Filoso deposition p. xxxx

17.PWCS reasons for changed between grievances and post litigation. PWCS never claimed undue hardship, or overburdensome, rather they claimed skeptism that they would work. Appel. Br.tab 86, Resp.Br.11,12 as a result no accommodations were made that would allow Filoso to do essential functions of job.

These illegal employment practices lead to Filoso being placed in an adverse work environment that was intolerable for her disability and caused time missed from work. Such actions were calculated to give PWCS a "legitimate" cause of action against Filoso to terminate her for excessive absences. PWCS had no other grounds for taking the adverse actions of not accommodating, transferring, adverse work environment and termination against Filoso nor do they claim any.

Filoso believes that she has provided direct and circumstantial evidence that her disability was a factor/motivating factor in her termination. Every action or inaction on the part of PWCS was in direct response to Filoso notifying them of the need to be accommodated and making accommodation requests. Filoso has no other employment issues nor does PWCS claim such.

PWCS in citing St. Mary's Honor Center v. Hicks, 509 U.S. 502, 125 L.ED.2d 407,133S Ct.2742 (1993); and Ennis v. Nat. Assn. Of Bus. Educ. Radio, Inc., 53 F.3d 55, 59 claim

she relied solely on speculation. Resp. Brief p.15 However, direct evidence is not required. The Supreme Court in Desert Palace, Inc. V. Costa , No. 02-679 June 2003 allows for a mixed motive analysis in which Filoso needs only to show that her disability was a contributing factor to the employment decision.

F. PWCS claim of not meeting employer's expectations fails when it was based on an illegal employment practice.

PWCS uses Tyndall v National Education Centers, Inc, 31 F.3d 209, 213 (4th Cir. 1994), Lamb v Quales, Inc., 33 Fed. Appx. 49, 56-57 (4th Cir.2002); Halperin v Abacus Tech. Corp., 128 F.3d 191, 199(4th Cir. 1997 to cite as not living up to employer's expectations by coming to work. Filoso has already addressed this issue. Filoso came to work all but 3 days. Appel.Br.Tab61. Those cases did not address the issue of time missed due to illegal employment action on part of employer that caused time missed once at work. There is a clear dispute of material facts that are dispositive of the case and not appropriate for summary judgment.

G. PWCS **omits inspections, letters, and citations concerning air quality issues in their buildings from VOSHA, Prince William Health Department, and Prince William County Building.**

Appel. Br.App C.p.3,20,22. Appel. Br.Tab 2,3,34,47. Appellant Reply Br.6-7.

Conclusion

Filoso has shown that the Fourth Circuit has ruled inconsistent with its Sister Circuits. That there are triable dispositive issues that were improperly decided on in favor of the nonmoving party when there are clearly disputes in the material facts. That it is a question of first impression regarding constructive discharge/retaliation as it applies to an individual whose disability is caused "an act" of harm by comparing it to a regular person. Filoso respectfully requests that Certiorari be granted to remedy these injustices.